

Before the  
Federal Communications Commission  
Washington, D.C. 20544

In the Matter of	)	
	)	
Review of Regulatory Requirements for	)	
Incumbent LEC Broadband	)	CC Docket No. 01-337
Telecommunications Services	)	

COMMENTS OF

NEW EDGE NETWORK, INC. D/B/A NEW EDGE NETWORKS

New Edge Network, Inc. d/b/a New Edge Networks hereby files its comments in the above-referenced proceeding regarding the regulatory requirements for broadband telecommunications services provided by incumbent local exchange carriers (incumbent LECs).

New Edge Networks provides digital subscriber line (DSL) and enhanced data communications nationally in small and midsize cities where populations generally range from 5,000 to 250,000. The company's DSL service is available in more than 360 small and midsize cities in 29 states. New Edge Networks also owns and operates a national data communications network with 18 regional hubs and almost 600 nodes making it one of the largest asynchronous transfer mode (ATM) networks in the United States.

New Edge Networks provides competitive DSL transport services along with asynchronous transfer mode (ATM) and frame relay services through a combination of its own facilities (multi-service platform switches collocated in central offices), incumbent local exchange carrier (incumbent LEC) unbundled network elements and in some cases resale. New Edge Networks is dependent upon the incumbent LEC unbundling and resale obligations contained in the Telecommunications Act of 1996 (Act) in order to provide competitive broadband retail services.

I. INTRODUCTION

Pursuant to this rulemaking, the Commission seeks to establish regulatory requirements that can best balance the following goals: (1) encourage broadband investments and deployment; (2) foster competition in the provision of broadband services; (3) promote innovation; and (4) eliminate unnecessary regulation.<sup>1</sup> New Edge Networks believes that establishing regulatory requirements that can “best” balance these goals is laudable. Indeed, no party can legitimately argue otherwise. Unfortunately, it appears that the Commission has predetermined the appropriate path necessary to “best balance” these goals. That path consists of removing all regulatory obligations on the incumbent LEC-provided broadband services including the unbundling and resale obligations contained in the Telecommunications Act of 1996 (Act). New Edge Networks believes that the path advocated by the Commission and the incumbent LECs will not result in the best balance of the aforementioned goals. Instead, incumbent LECs will extend their dominance to the Internet by leveraging their control over voice local exchange services and the underlying outside plant facilities.

Counter to Commissioner Powell’s statement in this proceeding, this is a grand departure from the Commission’s ongoing efforts to implement unbundling, collocation and other market-opening requirements.<sup>2</sup> Furthermore, New Edge Networks believes the Commission is starting to severely overstep its authority. As Commissioner Copps stated in his statement, “setting competition policy is the exclusive jurisdiction of Congress.”<sup>3</sup>

Based on previous statements made by Commissioner Powell and tentative conclusions reached by the Commission in recent rulemakings, it appears as if setting competition policy is now the jurisdiction of the incumbent LECs. The Commission, along with certain large high-tech corporations such as Intel, is blindly accepting the incumbent LECs’ arguments that without regulatory relief broadband facilities will not be deployed. Comments by incumbent LECs stating that without major regulatory changes there will be no expansion of broadband facilities has apparently convinced the Commission that regulatory relief is necessary to accelerate the deployment of broadband facilities.

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<sup>1</sup> Notice of Proposed Rulemaking (NPRM), CC Docket No. 01-337, In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, at paragraph 7.

<sup>2</sup> NPRM, Separate Statement of Chairman Michael K. Powell.

<sup>3</sup> NPRM, Separate Statement of Commissioner Michael J. Copps.

Ironically, companies like Intel used to lobby state public utility commissions to force incumbent LECs to accelerate deployment of integrated services digital network (ISDN) services at reasonable terms and conditions. This was prior to passage of the Act and there were no unbundling and resale obligations imposed on incumbent LECs at the time. Of course, DSL technology was also developed prior to passage of the Act. However, DSL services were not available to consumers until after the Act became law and was first deployed by an intra-modal competitive provider. Only in response to the competitive pressures from both inter-modal cable providers *and* intra-modal competitive broadband providers did incumbent LECs accelerate their DSL deployment.

## II. IDENTIFICATION OF INCUMBENT LEC-PROVIDED BROADBAND SERVICES MARKETS

The Commission states that the first step in assessing what regulatory requirements are appropriate for incumbent LEC-provided broadband services is to define and analyze the relevant markets in which incumbent LECs provide these services.<sup>4</sup> As such, the Commission seeks input regarding the relevant product and geographic market for incumbent LEC-provided broadband services.

### A. Relevant Product Market

Instead of specifically identifying the relevant product markets, the Commission asked parties to identify the relevant product markets that include incumbent LEC-provided broadband services.<sup>5</sup> Pursuant to the NPRM, the term “broadband service” describes a broad array of high-speed telecommunications services.<sup>6</sup> The Commission states that it purposely used the term “broadband services” to avoided pre-judging which services belong in the same product markets and to avoid addressing statutory-based definitional issues and instead focus on addressing the relevant markets in which these services participate.<sup>7</sup>

There are three major problems with the Commission’s lack of specificity regarding its definition of broadband in this proceeding. First, and foremost, statutory-

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<sup>4</sup> NPRM at paragraph 17.

<sup>5</sup> NPRM at paragraph 18.

<sup>6</sup> NPRM at footnote 2.

based definitional issues matter. In fact, any analysis in this proceeding could be meaningless if the Commission decides to alter how broadband services are classified for statutory purposes. If DSL and ATM services are reclassified as information services, for example, then any analysis in this proceeding regarding these services is meaningless. The incumbent LECs' DSL and ATM services would be deregulated regardless of what was determined to be the appropriate regulatory structure. As an intra-modal competitive broadband provider reliant upon the Act in order to purchase unbundled network elements, New Edge Networks believes that the Commission cannot ignore statutory-based definitional issues when determining the appropriate regulatory framework for incumbent LEC-provided services.

Second, the Commission's lack of specificity regarding the definition of broadband services prevents parties from focusing their comments and attention on a specific set of services. The Commission previously defined broadband services as services providing transmission speeds over 200 kbps. Qwest considers broadband as 10 Mbps.<sup>8</sup> Newton's Telecom Dictionary defines broadband as greater than 45 Mbps.<sup>9</sup> High-tech companies pushing the Commission for a broadband policy advocate that broadband is 100 Mbps. With such a vast difference in interpretations regarding the definition of broadband, New Edge Networks does not have the resources to analyze all of the incumbent LEC-provided services that could potentially qualify as a broadband service based on the Commission's open-ended definition.

Third, the lack of specificity means that the type of services that could be considered broadband and subject to the outcome of this proceeding could include special and switched access services. Again, such a nebulous definition means that a vast array of services could be subject to the outcome of this proceeding. It seems as if an open invitation was sent to the incumbent LECs to argue for deregulation of all but their most basic voice services.

## B. Market Power Analysis

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<sup>7</sup> NPRM at footnote 37.

<sup>8</sup> Qwest CEO Joe Nacchio stated, "We're doing DSL. That's interesting, but that's not really broadband. We want 10 megabits to the home. We want three simultaneous video channels, voice channels, data channels, all going at the same time." Xchange, March 2002, pg. 52.

<sup>9</sup> Newton's Telecom Dictionary, 15<sup>th</sup> Edition, pg. 113.

The Commission recognized in the NPRM that a carrier possesses individual market power when that carrier can profitably raise and sustain prices above competitive levels.<sup>10</sup> The Commission also noted that carriers exercise market power in two ways. First, a carrier may be able to raise prices by restricting its output. Second, a carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input.<sup>11</sup> With respect to DSL services, New Edge Networks believes that there is sufficient evidence to conclude that incumbent LECs possess significant market power.

To start, incumbent LECs restrict their output by limiting their DSL product offering to line-shared ADSL services only. In addition, incumbent LECs do not condition loops in order to qualify a customer for their ADSL services. Thus, customers will not qualify for incumbent LEC-provided DSL services if their existing loop contains bridged tap or load coils. Alternatively, competitive DSL providers offer a variety of DSL flavors including ADSL, SDSL and IDSL and will often request loop conditioning in order to serve the maximum number of customers possible.

Incumbent LECs also control essential facilities that are required by competitive DSL providers. Collocation and unbundled loops are perfect examples of essential facilities necessary for New Edge Networks to provide a competitive DSL product. In many cases, these elements are priced to prevent New Edge Networks from effectively competing with the incumbent LECs' services. For example, SBC quoted New Edge Networks as much as \$38,203 in nonrecurring charges to augment the number of its terminations in preparation of adding line shared ADSL services. This one time charge was for adding 200 DS0 and 4 DS3 terminations.<sup>12</sup> On numerous occasions, New Edge Networks requested the supporting documentation from SBC to support its price quote but was denied each time. Instead of filing a costly and time consuming complaint in order to get reasonable price quotes, New Edge Networks elected to withdraw from providing line-shared ADSL in this market.

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<sup>10</sup> NPRM at paragraph 28.

<sup>11</sup> NPRM at paragraph 28.

<sup>12</sup> SBC quoted New Edge Networks nonrecurring charges of \$36,817 (300 DS0s, 2 DS3s), \$21,689 (200 DS0s, 1 DS3) and \$20,486 (200 DS0s, 4 DS3s) for similar augments requesting additional terminations.

With respect to unbundled loops, the incumbent LECs have been more creative and resourceful in restricting rivals' output. First, the monthly recurring cost of unbundled loops is often a barrier to entry for competitive DSL providers, especially in the more rural markets.

Second, the nonrecurring cost of installing a loop can quickly deter competitive providers from offering a customer DSL services. While some public utility commissions have set reasonable loop conditioning charges, the incumbent LECs continue to find alternative ways to increase the charges imposed on competitive providers. SBC, for example, will only remove bridged tap that is greater than 2,500 feet.<sup>13</sup> SBC refers to this as excessive bridged tap. Loop conditioning rates set by state commissions apply for the removal of excessive bridged tap. If, however, a competitive providers' DSL service requires the removal of "non-excessive" bridged tap, then the competitive provider must sign a separate amendment. Of course, this amendment contains loop-conditioning rates higher than those set by the state commission.

Third, a significant percentage of orders submitted by competitive DSL providers are rejected by the incumbent LEC due to a variety of issues such as lack of facilities, remote terminals, integrated digital loop carrier and loop length. Where a lack of facilities issue exists, New Edge Networks is unable to deliver DSL services to the customer. Moreover, New Edge Networks cannot request new facilities be placed because incumbent LECs maintain that they are not obligated to deploy new facilities in response to a request for unbundled network elements.

Incumbent LECs have also restricted output by unaffiliated Internet Service Providers (ISPs) using the incumbent LECs' DSL transport services to provide high-speed Internet access. The Qwest migration of customers from its own ISP to Microsoft Networks (MSN) is a prime example. MSN entered into an agreement with Qwest to be the ISP for customers currently using Qwest's Internet services. Customers were then led to believe that they had no alternative but to switch to MSN. Customers that tried to switch to another ISP faced lengthy outages and numerous billing issues.

Another example is SBC Advanced Solutions, Inc.'s (SBC-ASI) requirement in its interconnection agreements that SBC-ASI may, at its own discretion, provision other

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<sup>13</sup> Bridged tap over 2,500 feet is referred to as excessive bridged tap by SBC.

applications on the same line that is carrying the competitive providers virtual session to the end user and may fully market such applications and related services. Essentially, SBC-ASI is setting up a network architecture whereby the competitive provider pays for the access to the customer but SBC-ASI is able to market additional services to that customer using a separate virtual path. As a result, the competitive provider pays for the connectivity to the customer and SBC-ASI gets to use that connectivity, at no charge, to market SBC-ASI's services. These types of policies effectively deter competitive providers from using incumbent LECs for the provision of DSL transport services.

### III. APPROPRIATE REGULATORY REQUIREMENTS

#### A. Overview

The stated purpose of the Commission's inquiry into the relevant product and geographic markets for broadband services is to determine what regulatory requirements, if any, should govern the provision of incumbent LEC-provided broadband services.<sup>14</sup> More concerning is the Commission's question regarding whether reduced regulation of services provided by incumbent LECs, regardless of the extent of existing competition, may foster competition and the development of broadband facilities used in the provision of these services.<sup>15</sup> Again, New Edge Network fears that the Commission has already predetermined its position and is using the NPRM process to make effective its goal of deregulating the incumbent LECs regardless of the extent of competition.

#### B. Existing Regulatory Structure

The purpose of the existing regulatory requirements is to prevent dominant firms from fully exercising their market power. This purpose, or goal, is still very relevant regardless of the service provided by the incumbent LEC. New Edge Networks is adamantly opposed to the question posed by the Commission asking whether or not deregulating the incumbent LECs will further the Commission's goals regardless of the state of competition in that market. As a fundamental element of any regulatory

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<sup>14</sup> NPRM at paragraph 33.

<sup>15</sup> NPRM at paragraph 39.

framework, New Edge Networks believes that the degree of regulation should be commensurate with the degree of market power.

#### C. Alternative Requirements

The Commission is concerned that the existing regulatory requirements for the provision of broadband services by incumbent LECs are no longer appropriate. The Commission's concern is based on the fact that the basic elements of the current regulatory requirements were largely in place prior to the development of competition between providers of broadband services. Furthermore, the requirements were primarily developed to address problems created in a one-wire, analog, circuit-switched world.<sup>16</sup> Thus, the Commission concludes that the existing regulatory requirements may be poorly suited to achieving the Act's goals of promoting infrastructure investment.<sup>17</sup> New Edge Networks does not share the Commission's view.

Again, New Edge Networks believes that regulatory oversight should be commensurate with market power. As such, the Commission's current regulatory framework of classifying services as either dominant or non-dominant is appropriate regardless of whether the service being offered is a voice or broadband service. Most important is whether or not the incumbent LEC has market power regarding the delivery of that service.

Finally, the Commission should not relax its regulatory oversight simply based on promises and threats made by incumbent LECs that they will not deploy broadband facilities without regulatory relief.

#### IV. ALTERNATIVE REGULATORY AND MARKET STRUCTURE

New Edge Networks believes that there is an alternative regulatory framework that would better meet the Commission's goals of encouraging *economic* broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation and eliminating unnecessary regulation. That regulatory framework is based on full structural separation of the incumbent LECs into wholesale

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<sup>16</sup> NPRM at paragraph 38.

<sup>17</sup> NPRM at paragraph 38.

and retail companies. Pursuant to this regulatory framework, the Commission would regulate wholesale services and state public utility commissions would regulate retail services. New Edge Networks believes that this type of regulatory framework would better balance the Commission's goals to encourage broadband investment and deployment, promote competition, accelerate innovation and reduce regulatory cost for all providers. New Edge Networks asks that the Commission seriously consider the benefits of structurally separating the incumbent LECs in this manner.

A. Encourage broadband investment and deployment

Structurally separating incumbent LECs would encourage broadband investment and deployment in a number of ways. First, wholesale prices could be set that ensure the incumbent wholesale provider earns a return sufficient to encourage broadband investment. Questions regarding the appropriate common cost allocation and other cost inputs could be addressed in one proceeding instead of the each state having to address the issue for each incumbent ILEC individually.

Second, development of a "national" broadband policy would be easier to develop and implement. New Edge Networks believes that the Commission will eventually be debating whether or not broadband services should receive universal support in order to keep costs low and expand their geographic reach. This belief is based on the knowledge that the cost of building out fiber to the home will be extremely expensive and it is unlikely that consumers will be willing to pay the full cost of the build out. If that is the case and Congress decides that there needs to be a fund to offset the build-out costs, then the Commission could easily set up a broadband deployment fund that would help subsidize the build-out of a "true" broadband network. As a competitive provider, New Edge Networks would be more willing to contribute to a broadband service fund if it knew it would be able to access the broadband network on the same prices, terms and conditions as all other retail providers.

B. Foster competition in the provision of broadband services

Structurally separating the incumbent LECs into wholesale and retail companies would greatly increase competition in the provision of broadband services at the retail

level. First, all competitive providers would purchase unbundled network elements and services from the incumbent wholesale network provider at nondiscriminatory rates, terms and conditions. Clearly that is not happening in today's environment. For example, incumbent LECs provide DSL services by placing DSLAMs in their central offices. Similar to the way New Edge Networks provides DSL services. However, New Edge Networks is 100 percent certain that incumbent LECs did not incur the same level of costs as those imposed on New Edge Networks by the incumbent LECs.

Second, retail prices for all telecommunications services would be more appropriately aligned with underlying costs. One factor that has severely dampened competition for retail local exchange services is the fact that incumbent LECs' retail prices for local exchange services are often priced below wholesale costs. This issue is seldom addressed because state public utility commissions are reluctant to raise prices for retail local exchange services. However, it cannot be disputed that competition in the local exchange market has been limited in many cases due to the fact that unbundled network elements are priced using a different cost methodology than retail local exchange services.

#### C. Promote innovation

New Edge Networks believes that the best way to promote innovation is to have as many competitive providers trying to serve as many customers as economically possible. Under a regulatory framework of structural separation, there would be a multitude of providers accessing the wholesale network to provide retail services to consumers. Retail providers would be forced to differentiate their products from other providers in order to gain market share. As such, there is a substantial economic incentive to innovate.

With respect to innovation regarding the wholesale network, a regulatory framework of structural separation can be no worse than the Commission's current goal of limiting competition to the incumbent LECs, cable, wireless and satellite providers. These market players would still exist and still compete with each other. The major difference being that customers would still have a choice of retail service providers even if there is only one or two underlying network providers serving them. Under the

Commission's proposed framework, consumer choice would always be limited to the number of underlying network providers.

D. Eliminate unnecessary regulation

Structural separation would provide the greatest impact in eliminating unnecessary regulation. InterLATA restrictions could be lifted since all retail carriers would have access to the wholesale network on nondiscriminatory terms and conditions. In fact, the term local access and transport area (LATA) could be completely removed from use in the telecommunications industry. Structural separation could also remove the arbitrary distinction between intrastate and interstate services. This would eliminate the need to generate costly cost allocation manuals. In fact, the number of cost studies would be substantially reduced because they would not have to be duplicated at the state level for "intrastate" services. In short, structural separation would have tremendous savings in regulatory costs. At the same time, retail competition and innovation would dramatically increase. Broadband deployment could also be accelerated depending upon the policy objectives set by Congress.

V. CONCLUSION

Incumbent LECs have done a wonderful job convincing the Commission that broadband facilities will not be deployed without regulatory relief from the unbundling and resale obligations contained in the Act. New Edge Networks urges the Commission to seriously consider regulatory alternatives that would better balance its goal to encourage broadband deployment, foster competition, promote innovation and eliminate unnecessary regulation.

Through a series of Commission initiated rulemakings, the Commission is about to implement its own method of creative destruction by relieving the incumbent LECs of their unbundling and resale obligations. This action would all but eliminate intra-modal competitive broadband providers and unaffiliated Internet service providers. New Edge Networks believes that the Commission is taking the wrong path. The Commission's actions will result in a few mega-corporations controlling high-speed access to the Internet. Broadband services will be controlled by a few deregulated monopolies,

competition severely limited and innovation killed. The only goal achieved by the Commission will be the elimination of regulation.

Respectfully Submitted,

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